IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL HILL,

Petitioner,

v.

C. HOLINKA,

Respondent.

OPINION and ORDER

10-cv-65-bbc

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In an order entered October 1, 2010, I concluded that petitioner Michael Hill's petition for a writ of habeas corpus brought under 28 U.S.C. § 2241 should be construed as a request for relief under 28 U.S.C. § 2255 and ordered his case transferred to the United States District Court for the Northern District of Illinois, where he had been sentenced. Now before the court is petitioner's motion for reconsideration of that order, in which he explains that he does not want to pursue a request for relief under § 2255 because he has already done so. Moreover, he has now tried to pursue a successive § 2255 petition by seeking certification from a panel of the Court of Appeals for the Seventh Circuit and has had that request rejected as well.

As a general rule, a court should not construe a petition brought under § 2241 as a

request for relief under § 2255; as the Court of Appeals for the Seventh Circuit once admonished, "[p]ersons who initiate independent litigation are entitled to have it resolved under the grant of authority they choose to invoke." Collins v. Holinka, 510 F.3d 666, 667 (7th Cir. 2007). However, in this case, the suggestion to so convert came from the court of appeals. Originally, I dismissed the petition brought under § 2241 on the ground that relief under § 2255 had not been foreclosed. 28 U.S.C. § 2255(e) provides that a § 2241 petition contesting the validity of a conviction "shall not be entertained" unless § 2255 is "inadequate or ineffective to test the legality of [the petitioner's] detention." The court of appeals vacated the judgment in this case, explaining that

> We find that Hill has made a substantial showing of the denial of a constitutional right as to as to [sic] whether he could be sentenced as an armed career criminal on the basis of his prior convictions for aggravated battery, and that Hill has never filed a § 2255 motion in his district of conviction, the Northern District of Illinois.

Hill v. Holinka, 10-2043, slip op. (7th Cir. July 27, 2010). The court of appeals remanded "in order to give the district court the opportunity to consider transferring the case to the Northern District of Illinois." Id.

As I explained in the order transferring the case, following the court of appeals' decision, there seemed to be no basis for allowing this case to continue to proceed under § 2241 and there would be no ground for transferring the case unless the petition were construed as a § 2255 motion as the court of appeals suggested.

As petitioner points out, the court of appeals was wrong about the facts: he *had* filed a § 2255 motion; court records show that it was denied on July 5, 2000. United States of America v. Hill, 00-cv-50236, slip op., dkt. #2 (N.D. Ill. July 5 2000). Because he knew he had done so, he tried a different tack: after the court of appeals suggested that petitioner should pursue relief under § 2255, he filed a motion for an order authorizing the district court to entertain a successive § 2255 motion. However, the court of appeals denied that motion, concluding that his request for relief was "unsupported by any new rule of constitutional law made retroactive on collateral review by the Supreme Court." Hill v. United States of America, 10-334, slip op. (7th Cir. Oct. 15, 2010). The court did not mention its previous order suggesting that petitioner could pursue relief under § 2255. Id.

In the midst of this confusion, petitioner asks for reconsideration of the order construing his § 2241 petition as a § 2255 motion and transferring the case. All signs weigh in favor of granting that motion, but first I must consider whether I still have jurisdiction over the case. "Generally speaking, a district court relinquishes all jurisdiction over a case when it is transferred to another district court." Jones v. InfoCure Corp., 310 F.3d 529, 533 (7th Cir. 2002). However, there is no bright-line rule for when a court loses jurisdiction over a case. In Robbins v. Pocket Beverage Co., Inc., 779 F.2d 351, 356 (7th Cir. 1985), the court of appeals concluded that the district court had jurisdiction to reconsider its earlier motion to transfer the case. The court of appeals declined to find a single factor that could

definitively deprive the district court of jurisdiction, refusing to decide "whether the forwarding of the record should be the universally controlling fact." Id. Instead, the court considered the entirety of the circumstances and concluded that jurisdiction remained with the transferor court

> in light of the absence of: any indication in the transfer order that it was intended to be effective instantly; any attempt by the [transferee] court to exercise jurisdiction during the interval; any attempt by either party to persuade the [transferee] court to do so; a forwarding of the record in the case; and any other unusual circumstances.

Id. In this case, the case file has been transferred, if only electronically, but other than that there appears to be no difference. There is no evidence that the transferee court has attempted to exercise jurisdiction or petitioner has attempted to have them do so. Nor would he, knowing that he cannot proceed on a second § 2255 motion that has not been certified by the court of appeals. 28 U.S.C. § 2255(h). Under the present circumstances, I conclude that I continue to enjoy jurisdiction over the case despite the fact that I have ordered it to be transferred.

With that, I turn to the motion for reconsideration. There is no good reason to treat the petition as a § 2255 motion; petitioner does not want it to be so treated and to do so would only require immediate dismissal of the case. The only reason for doing so was the court of appeals' finding that he had not filed a § 2255 motion and could thus proceed under § 2255. As petitioner has shown, that factual finding was mistaken. For that reason, it was

error to construe his § 2241 petition as a request for relief under § 2255 and transfer his case. Petitioner's motion will be granted and the order transferring the case will be vacated.

The next question to address is whether petitioner should be allowed to proceed under § 2241. He is pursuing a challenge to the sentencing court's finding in 1999 that he was a career offender and an armed career criminal in light of his felonies for aggravated battery in Illinois. In 2009, the Court of Appeals for the Seventh Circuit held that convictions under the Illinois aggravated battery statute cannot be treated as prior crimes of violence because the statute "embraces two crimes: offensive battery and forcible battery," only one of which could be eligible for a crime of violence enhancement. United States v. Evans, 576 F.3d 766, 768-69 (7th Cir. 2009). In my original opinion dismissing the case, I concluded that petitioner could not proceed under § 2241 because relief under § 2255 had not been foreclosed. Dkt. #4. Although Evans was not in place when petitioner was sentenced, the Supreme Court had already ruled that courts should take a "categorical approach" when determining whether convictions are crimes of violence or violent felonies, meaning the sentencing court is required to look only to the statutory definition to determine eligibility. Taylor v. United States, 495 U.S. 575, 602 (1990). Thus, although the sentencing court did not have Evans to consider when deciding petitioner's § 2255 motion, it did have the general law in Taylor, which could have led to positive results had petitioner raised it in his § 2255 motion.

Upon reconsideration, I am less confident that this conclusion is correct. As the court of appeals pointed out in Evans, the conclusion that the Illinois aggravated battery statute is not a crime of violence does not come straight from the "categorical approach" in Taylor. Instead, it also relies on a very recent case, United States v. Woods, 576 F.3d 400 (7th Cir. 2009). In Woods, 576 F.3d at 412-13, the court put another spin on the Supreme Court's "categorical approach." Cases such as Taylor, 495 U.S. at 602, and its progeny generally required a categorical approach but allowed district courts to go beyond the statutory definition "in a narrow range of cases where a jury was actually required to find all the elements" of the crime. In Taylor, the Court explains this with an example:

> [I]n a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.

Id.

Thus, it would appear from Taylor that the judicial record could still be used in cases involving convictions under statutes that include multiple kinds of criminal activity. Indeed, this is how the dissent in Woods read Taylor and its progeny. Woods, 576 F.3d at 415 (Easterbrook, J., dissenting). However, the majority read these cases more narrowly as allowing an exception to the "categorical approach" only in instances in which "the statute defining the crime is divisible, which is to say where the statute creates several crimes or a

single crime with several modes of commission . . . somehow identified in the statute." I am less than certain that the sentencing court could have anticipated the subtle argument in Woods that treats statutes such as the Illinois aggravated battery statute differently from more "divisible" statutes. Thus, I am persuaded that relief under § 2255 may have been foreclosed in this case.

To proceed under § 2241, petitioner must show not only that relief was foreclosed under § 2255, but also that the challenge involves a claim of "actual innocence." It remains an open question whether challenges to the status of career offender or armed career criminal can be treated as a claim for "actual innocence," but I have already concluded that the current state of the law at least warrants a response from respondent on the matter. Phillips v. Holinka, 10-cv-439-bbc, slip op., dkt. #2, at 3-4 (W.D. Wis. Aug 25, 2010) (citing Gilbert v. United States, 609 F.3d 1159, 1166 (11th Cir. 2010); Garza v. Lappin, 253 F.3d 918, 922-23 (7th Cir. 2001); In re Davenport, 147 F.3d 605, 609-10 (7th Cir. 1998)).

In conclusion, it appears that relief under § 2255 may have been foreclosed and petitioner is pursuing a claim of actual innocence. In light of the holding in Evans that Illinois's aggravated battery statute cannot count as a crime of violence or violent felony, it appears that petitioner's claim for relief from his status as career offender and armed career criminal may have merit. Therefore, I will allow petitioner to proceed on his § 2241 petition and direct respondent to respond to the petition.

ORDER

IT IS ORDERED that

1. No later than 20 days from the service of this petition, respondent Carol Holinka is to file a response showing cause, if any, why this writ should not issue with respect to petitioner Michael Hill's claim that his sentence was enhanced unlawfully under the career-offender and armed career criminal guidelines.

2. Petitioner may have 10 days from the service of the response in which to file a traverse to the allegations of the response submitted by respondent.

3. For the sake of expediency, I will send the petition to Warden Holinka, the local United States Attorney and the United States Attorney General via certified mail in accordance with Fed. R. Civ. P. 4(i), along with a copy of this order.

Entered this 28th day of October, 2010.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge